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May 11, 2005

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: September 3, 2004

Case No.: TIA-0184

XXXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits for her late husband (the Worker). The Worker was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the Applicant did not have an illness related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the Appeal should be denied.

*I. Background*

*A. The Relevant Statute and Regulations*

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B provided for a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D provided for a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004) (the Authorization Act). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. *Id.* § 3681(g). In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B. *Id.* § 3675(a).

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

### *B. Procedural Background*

The Worker was employed as a machinist at the Oak Ridge Gaseous Diffusion Plant (the plant). He worked at the plant for approximately 13 years, from 1952 to 1965.

The Applicant filed a Subpart B application and a Subpart D application, claiming chronic obstructive lung disease, emphysema, heart disease and lung cancer with metastases to the brain. The DOL issued a positive Subpart B determination for the lung cancer. See OWA Record at 391. The OWA forwarded the Subpart D application to the Physician Panel, which issued a negative determination. The OWA accepted the Physician Panel's determination. The Applicant filed the instant appeal.

## *II. Analysis*

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to toxic exposure at the DOE

site, and state the basis for that finding. 10 C.F.R. § 852.12. The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing the illness." *Id.* § 852.8.

The Applicant's receipt of a positive DOL Subpart B determination for lung cancer satisfies the Subpart E requirement that the illness be related to a toxic exposure during employment at DOE. Authorization Act § 3675(a). See also *Worker Appeal*, Case No. TIA-0228, 29 DOE ¶ 80,202 (2005). Accordingly, the DOL Subpart B determination has rendered moot the Physician Panel determination on the claimed lung illness.

The Applicant's argument that the Worker's heart disease was related to toxic exposure at DOE does not indicate Panel error. The Panel found that the plant did not contain toxic substances associated with the Applicant's heart disease. Although the Applicant states that medical literature indicates that toxic exposures can be a significant cause of heart disease, she does not identify the toxic substance or the literature to which she refers. Accordingly, the Applicant has not demonstrated Panel error.

As the foregoing indicates, the appeal should be denied. In compliance with Subpart E, the claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's dismissal of this appeal does not purport to dispose of or in any way prejudice the DOL's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy, Case No. TIA-0184, be, and hereby is, denied.
- (2) This dismissal pertains only to the DOE appeal and not to the DOL's review of this claim under Subpart E.

(3) This is a final order of the Department of Energy.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: May 11, 2005